

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DALE HARMS,

Plaintiff,

v.

BAC HOME LOANS SERVICING, LP;
RECONTRUST COMPANY, N.A., AND
DOES 1-10, INCLUSIVE,,

Defendants.

No. C 11-02757 CW

ORDER GRANTING
MOTION TO DISMISS
AND DENYING MOTION
TO FILE AMENDED
COMPLAINT

INTRODUCTION

Plaintiff brings claims against Defendants Bank of America Home Loan Servicing (BACHLS) and ReconTrust for violations of the Fair Debt Collection Practices Act (FDCPA) and the Fair Credit Reporting Act (FCRA), along with claims for violations of California state law. This is the second lawsuit that Plaintiff has brought against Defendants. Plaintiff has filed a motion for leave to amend. Defendants have filed a motion to dismiss the complaint. For the reasons stated below, Defendants' motion to dismiss is GRANTED and the motion to file an amended complaint is DENIED.

BACKGROUND

Plaintiff denies having any contractual agreement for credit, loans or services with Defendants and challenges the existence of a debt. Instead, Plaintiff bases his claims under the FDCPA on Defendants' alleged failure to validate his debt and Defendants' attempt to collect that debt. He bases his FCRA claims on

1 Defendants' reporting his debt to credit bureaus allegedly without
2 having validated the debt.

3 A court may take judicial notice of matters of public record
4 without converting a motion to dismiss into a motion for summary
5 judgment. See Fed. R. Civ. P. 12(d); Mir v. Little Co., 844 F.2d
6 646, 649 (9th Cir.1988). Plaintiff provides a copy of a
7 promissory note, executed on April 14, 2005, showing that he did
8 obtain a loan from Ampro Mortgage Company, in the amount of
9 \$392,000. Pl.'s Ex. B. The note acknowledges an understanding on
10 the borrower's part that the lender may transfer the note.

11 Defendants provide a copy of the deed of trust (DOT) signed
12 by Plaintiff. RJN Ex. 1. MERS is listed as the nominee of the
13 trustee and the beneficiary of the DOT. Ampro Mortgage Company is
14 identified as the lender and trustee. Paragraph 20 of the DOT
15 allows for sale of the note without prior notice to borrower.
16 Paragraph 23 allows the lender to appoint successor trustees. On
17 March 8, 2010, MERS, as beneficiary and in accordance with
18 Paragraph 23, transferred trustee status to ReconTrust and
19 transferred its beneficial interest to Bank of New York Mellon
20 (BNY). RJN Ex. 2. The first notice of default (NOD) was sent two
21 days later. RJN Ex. 3. The second NOD was issued on February 10,
22 2011. RJN Ex. 5.

23 On March 1, 2011, Plaintiff sent a cease-and-desist letter to
24 Defendants requesting validation of his debt. He received what he
25 calls an alleged verification, with a copy of the note and the
26 deed of trust, a computer printout of the "alleged loan history,
27 only showing alleged payments." Compl. at 6.

28

1 Plaintiff's complaint comprises six claims. The first claim
2 alleges as a violation of state law that Defendants sent him an
3 account statement indicating a need for an immediate response
4 rather than allowing thirty days "as required by law." Compl. at
5 5. The 1AC identifies the Rosenthal Fair Debt Collection
6 Practices Act (RFDCPA) as the statute Defendants allegedly
7 violated. Cal. Civ. Code § 1788 et. seq.

8 Plaintiff's second claim alleges violations of the FDCPA, for
9 failure to provide validation of the "alleged debt" as required by
10 the statute and Defendants' continued attempt to collect the debt
11 in violation of the FDCPA.

12 Plaintiff's third claim alleges that because Defendants did
13 not provide validation of the debt, information regarding his
14 outstanding debt that was furnished to credit bureaus was
15 erroneous or inaccurate, in violation of the FCRA, under 15 U.S.C
16 § 1681s-2.

17 Plaintiff's fourth claim alleges that Defendants failed to
18 mark his account in dispute in violation of the FCRA, under 15
19 U.S.C § 1681s-2. Subsection (a)(3) establishes the duty to
20 provide a notice of dispute.

21 Plaintiff's fifth cause of action is titled "continued
22 collection activity" but alleges false or misleading
23 representations under 15 U.S.C. § 1692e.

24 Plaintiff's sixth cause of action alleges willful non-
25 compliance with the FDCPA and the FCRA. It, however, cites to the
26 provisions of the statute for negligent non-compliance. 15 U.S.C.
27 § 1681n.

1 Plaintiff's first lawsuit in this district against
2 ReconTrust, MERS, BNY, and BACHLS was dismissed by this Court as
3 legally frivolous, for failing to state a cognizable claim upon
4 which relief could have been granted. RJN Ex. 8. Plaintiff cited
5 criminal statutes and brought a securities claim despite not
6 having purchased any of the mortgage-backed securities in
7 question.

8 Plaintiff's complaint does not specify which claim is brought
9 against which Defendant.

10 LEGAL STANDARD

11 A complaint must contain a "short and plain statement of the
12 claim showing that the pleader is entitled to relief." Fed. R.
13 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
14 state a claim, dismissal is appropriate only when the complaint
15 does not give the defendant fair notice of a legally cognizable
16 claim and the grounds on which it rests. Bell Atl. Corp. v.
17 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
18 complaint is sufficient to state a claim, the court will take all
19 material allegations as true and construe them in the light most
20 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
21 896, 898 (9th Cir. 1986). However, this principle is inapplicable
22 to legal conclusions; "threadbare recitals of the elements of a
23 cause of action, supported by mere conclusory statements," are not
24 taken as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)
25 (citing Twombly, 550 U.S. at 555).

26 When granting a motion to dismiss, the court is generally
27 required to grant the plaintiff leave to amend, even if no request
28 to amend the pleading was made, unless amendment would be futile.

1 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
2 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
3 amendment would be futile, the court examines whether the
4 complaint could be amended to cure the defect requiring dismissal
5 "without contradicting any of the allegations of [the] original
6 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
7 Cir. 1990).

8 Although the court is generally confined to consideration of
9 the allegations in the pleadings, when the complaint is
10 accompanied by attached documents, such documents are deemed part
11 of the complaint and may be considered in evaluating the merits of
12 a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d
13 1265, 1267 (9th Cir. 1987).

14 DISCUSSION

15 Plaintiff's federal claims fail because they state in
16 conclusory terms that Defendants violated the FDCPA and the FCRA.
17 He fails to explain how the FDCPA applies to Defendants and fails
18 to allege any conduct violating the FCRA. Furthermore, as a
19 matter of law, the FDCPA does not apply to the foreclosure
20 process, and Plaintiff does not have standing to sue under the
21 relevant provision of the FCRA. Finally, taking judicial notice
22 of the promissory note and DOT, both of which recognize the
23 lender's right to transfer, Defendants are in proper and legal
24 possession of the DOT.

25 Plaintiff's motion for leave to amend his complaint attaches
26 his first amended complaint (1AC), which pleads the state law
27 claim with greater specificity, in that he identifies the relevant
28 state law as the Rosenthal Fair Debt Collection Practices Act

1 (RFDCPA). However, Plaintiff continues to deny having a debt
2 obligation to Defendants.

3 The provisions of the FDCPA under which Plaintiff brings his
4 suit apply only to those persons considered "debt collectors"
5 under the Act. The communications Defendants sent to Plaintiff
6 were part of the foreclosure process, and district courts in the
7 Ninth Circuit have concluded that "foreclosing on a property
8 pursuant to a deed of trust is not a debt collection within the
9 meaning of the RFDCPA or the FDC[P]A." Gamboa v. Trustee Corps,
10 2009 WL 656285 at *4 (N.D. Cal.); Landayan v. Washington Mut.
11 Bank, 2009 WL 3047238 at *3 (N.D. Cal.) (dismissing plaintiff's
12 FDCPA claim because "foreclosing on a deed of trust does not
13 invoke the statutory protections of the FDCPA"); Jozinovich v. JP
14 Morgan Chase Bank, N.A., 2010 WL 234895 at *6 (N.D. Cal.);
15 Izenberg v. ETS Servs., LLC, 589 F. Supp. 2d 1193, 1199 (C.D. Cal.
16 2008); Ines v. Countrywide Home Loans, Inc., 2008 WL 4791863 at *2
17 (S.D. Cal.); Hulse v. Ocwen Fed. Bank, FSB, 195 F. Supp. 2d 1188,
18 1204 (D. Or. 2002); but see Austero v. Aurora Loan Servs., Inc.,
19 2011 WL 1585530, at *9 (N.D. Cal.) (holding that "[w]here the
20 claim arises out of debt collection activities beyond the scope of
21 the ordinary foreclosure process, however, a remedy may be
22 available under the Rosenthal Act") (quotation marks omitted).

23 Even if Defendants were considered debt collectors, their
24 actions did not violate the FDCPA or the RFDCPA. Plaintiff
25 alleges that BACHLS violated 15 U.S.C. § 1692g by failing to
26 validate his debt and continuing foreclosure proceedings after he
27 sent his March 1, 2011 letter demanding validation. However,
28 section 1692g applies to the initial communication between a debt

1 collector and a consumer. The communication that Plaintiff
2 identifies in his complaint is the second NOD, not the initial
3 communication.

4 Additionally, there are no facts indicating that Defendants'
5 verification of the debt as required by the FDCPA was
6 insufficient. "Verification" refers to the paperwork a debt
7 collector may send to the debtor to fulfill its validation
8 obligations. "Validation" of a debt refers to the entire scheme
9 of statutory requirements imposed by 15 U.S.C. § 1692g. A debt
10 collector may verify a debt by contacting the creditor to
11 ascertain the nature and balance of the outstanding bill and
12 conveying the information to the debtor in the form of an itemized
13 statement. See Clark v. Capital Credit & Collection Servs., Inc.,
14 460 F.3d 1162, 1173-74 (9th Cir. 2006); Mahon v. Credit Bureau of
15 Placer County, Inc., 171 F.3d 1197, 1203 (9th Cir. 1999).

16 Plaintiff admits that he was provided with a copy of the note, the
17 DOT, and a history of his loan payments. Compl. at 6. He hopes
18 to impose a much higher standard, demanding that his debt be
19 validated by "somebody who has intimate firsthand knowledge of the
20 alleged account, signed under penalty of perjury." Plaintiff's
21 view is unfounded in statutory or case law.

22 Plaintiff also claims that the language "and will increase
23 until your account becomes current," printed on letters sent to
24 him, violates the FDCPA, but that language is printed in
25 accordance with California Civil Code section 2924c(b)(1) and does
26 not, as he contends, suggest that he must contact Defendants
27 immediately.

28 Plaintiff's fifth claim is for violation of 15 U.S.C.

1 § 1692e, which prohibits false and misleading representations by a
2 debt collector. Again, district courts in this circuit have not
3 considered communications that are part of the foreclosure process
4 to be debt collection.

5 Plaintiff lacks standing to maintain a claim against
6 Defendants under the FCRA, 15 U.S.C. § 1681s-2(a). The FCRA does
7 not provide for private rights of action based on violations of
8 subsection (a). 15 U.S.C. § 1681s-2(d).

9 A private right of action exists under 15 U.S.C. § 1681s-2(b)
10 against furnishers of information who fail to investigate a
11 disputed charge. Although Plaintiff recites this provision, he
12 neither alleges facts that would support a claim under subsection
13 (b) nor states, even in conclusory terms, that Defendants failed
14 to investigate a disputed charge. He only alleges that he
15 "reported this account to all three bureaus." Compl. at 15.

16 Plaintiff's sixth and final claim alleges willful non-
17 compliance with the FDCPA and the FCRA. Plaintiff does not
18 provide the Court with a statute providing for damages for a
19 willful violation of the FDCPA, but he does cite 15 U.S.C.
20 § 1681n, which imposes civil liability for willful non-compliance
21 with the FCRA. To prove a willful violation, a consumer must show
22 that the defendant violated the FCRA either knowingly or
23 recklessly. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57
24 (2007). Although the claim is titled "willful noncompliance,"
25 Plaintiff also includes the statutory provision for negligent non-
26 compliance with the FCRA. Plaintiff's claims for willful non-
27 compliance and negligent non-compliance fail because he pleads in
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1 wholly conclusory terms that Defendants did not comply with the
2 provisions of the FCRA.

3 Leave to amend should be freely given unless the court
4 determines that "the pleading could not possibly be cured by the
5 allegation of other facts." Cook, Perkiss and Liehe, Inc. v. N.
6 Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990).
7 Here, Plaintiff's FDCPA and RFDCPA claims fail as a matter of law,
8 because they fail to apply to Defendants at all; no additional
9 facts in an amended complaint can save them. Plaintiff's FCRA
10 claims fail factually, because he admits facts demonstrating that
11 Defendants provided proper verification of the debt. Because
12 Plaintiff's 1AC fails to cure any these deficiencies and there is
13 no realistic possibility that further amendment can cure them,
14 leave to amend is denied.

15 CONCLUSION

16 For the foregoing reasons, Defendants' motion to dismiss the
17 complaint is GRANTED, with prejudice.

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19 IT IS SO ORDERED.

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21 Dated: 11/23/2011

22 
23 CLAUDIA WILKEN
24 United States District Judge
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